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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 895.

ASSOCIATION

THE UNITED STATES, APPELLANT,

vs.

DAVID W. MINOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 4, 1884.

SUPREME COURT OF THE UNITED STATES.

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1 In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR. } In equity.

Bill of complaint.

To the judges of the ninth judicial circuit of the United States of America, in chancery, sitting in and for the district of California:

Benjamin Harris Brewster, Attorney-General of the United States, on behalf of the United States of America, brings this, his bill in equity, against David W. Minor, a resident of the county of Humboldt, State and district of California, and thereupon complains and says:

That on the twenty-third day of October, A. D. one thousand eight hundred and seventy-four, in pursuance of the several acts of Congress of the United States passed for the purpose of subjecting certain public lands of the United States to the right of pre-emption entry, under the restrictions, conditions, and stipulations as in said cases provided, the defendant herein,

2 David W. Minor, filed in the land office of the United States at Humboldt, State and district of California, a pre-emption declaratory statement for the northwest quarter of section No. eighteen (18), township No. — (6) north, of range No. two (2) east, Humboldt meridian, in the district of lands subject to sale in the land district of Humboldt, State and district of California, containing one hundred and sixty acres of land of the public lands of the United States, the said David W. Minor, alleging in said declaratory statement settlement on said land on the twentieth day of March, A. D. one thousand eight hundred and seventy-four. That on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five, at the land office of the United States at Humboldt, State and district of California, the defendant, David W. Minor, made the usual affidavit of pre-emption proof before Charles F. Roberts, who was then and there the duly qualified register of said land office of the United States, and duly empowered to administer the oath to the said David W. Minor, which said affidavit, among other things, set forth that he, the affiant, had made settlement on said land hereinbefore described; that he had settled upon said land on the said twentieth day of March, one thousand eight hundred and seventy-four, and that he had improved said land; that he had

3 built a house thereon twelve feet by sixteen feet, and continued to reside thereon from the time of his settlement until said twenty-third day of June, A. D. one thousand eight hundred and seventy-five, and cultivated about one acre; have barely and potatoes growing.

That said affidavit was then and there duly subscribed and sworn to by the said David W. Minor, at Humboldt, State and district of California, before Charles F. Roberts, the then duly qualified register of the land office of the United States at Humboldt district, State of California.

Your orator further avers that on the said twenty-third day of June, A. D. one thousand eight hundred, and seventy-five, said defendant, David W. Minor, made a further affidavit in support of his said pre-emption, as required by law, before the said Chas. F. Roberts, who was then and there

the duly qualified register of said land office of the United States, and duly empowered to administer the oath to said David W. Minor, which said affidavit, among other things, set forth in substance and effect, that he had not settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself.

4 That said affidavit was then and there duly subscribed and sworn to by the said David W. Minor at the Humboldt land office, State and district of California, before Chas. F. Roberts, the then duly qualified register of the land office of the United States for said Humboldt land district, State of California.

Your orator further avers that on the said twenty-third day of June, A. D. one thousand eight hundred and seventy-five, said defendant made a further affidavit in support of his said pre-emption, as required by law, before the said Chas. F. Roberts, who was then and there the duly qualified register of said land office of the United States, and duly empowered to administer the oath to said David W. Minor, which said affidavit, among other things, set forth in substance and effect that he was not the owner of three hundred and twenty acres of land in any State of Territory of the United States; that said affidavit was then and there duly subscribed and sworn to by said David W. Minor, at said Humboldt land office, State and district of California, before Chas. F. Roberts, the then duly qualified register of the United States land office of the Humboldt land district, State of California.

Your orator, further complaining, says that on the same day, to wit, on the twenty-third day of June, A. D. one thousand eight hundred

5 and seventy-five, the defendant herein, David W. Minor, paid to Solomon Cooper, the duly qualified receiver of the land office of the United States for the Humboldt land district, State of California, the sum of two hundred dollars, being a payment in full for the same land herein described, that is to say, public land of the United States known and described as the northwest quarter of section No. eighteen (18), in township No. six (6), north of range No. two (2), east Humboldt meridian, containing one hundred and sixty acres of land, at one dollar and twenty-five cents for each acre, being payment for the same tract of land hereinbefore described, and which was the subject of pre-emption proof before said land register.

That on the same day, as herein set forth, to wit, on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five, Chas. F. Roberts, the register of the land office of the United States for the Humboldt land district, issued to David W. Minor, the defendant herein, a certificate of purchase for the same portion of the public lands of the United States, to wit, the northwest quarter of section No. eighteen (18), in township No. six (6), north of range No. two (2) east, Humboldt meridian; containing one hundred and sixty acres of land, lying and being in the county of Humboldt, State of California, being the same tract

6 of land hereinbefore described, which was the subject of pre-emption proof before the said land register on the same day as hereinbefore set forth.

And your orator, further complaining, says that on the fifth day of January, A. D. one thousand eight hundred and seventy-six, the Government of the United States issued and delivered to the defendant, David W. Minor, a patent for the land herein described, to wit:

The northwest quarter of section No. eighteen (18), in township No. six (6), north of range No. two (2) east, Humboldt meridian, containing one hundred and sixty acres of land, lying in the county of Humboldt, State of California, which patent is now outstanding.

And your orator, upon information and belief, charges and avers that the entry and pretended settlement of David W. Minor, said defendant, of the land described herein, and the proof of settlement and improvements, were not made and offered as aforesaid in good faith, but, on the contrary, were false, fraudulent, and illegal, and that the oath of the said David W. Minor therein made on the twenty-third day *on* June, one thousand eight hundred and seventy-five, before Chas. F. Roberts, the said register of the land office of the United States for the Humboldt district, State of California, was taken, subscribed, and sworn to falsely in the premises.

7 And your orator further charges, on information and belief, and avers that the affidavit taken, duly sworn to, and subscribed by this defendant, David W. Minor, at said Humboldt land office, State and district of California, on the twenty-third day of June, one thousand eight hundred and seventy-five, before Chas. F. Roberts, the then duly-qualified register of the land office of the United States for the Humboldt land district, State of California, to the effect that he was not the owner of three hundred and twenty acres of land in any State or Territory of the United States, was then and there taken, subscribed, and sworn to falsely by him, the said David W. Minor.

And your orator, upon information and belief, further charges and avers that said defendant, David W. Minor, did not make actual settlement upon the land hereinbefore described on the said twentieth day of March, A. D. one thousand eight hundred and seventy-four, or at any time whatsoever, to wit, upon the northwest quarter section No. eighteen (18) in township No. six (6) north of range No. two (2) east, Humboldt meridian, and did not build or have any house thereon, and did not cultivate any portions of said lands, or fence the same or any portion thereof, and did not at any time make or own any improvements upon said lands of the value of one hundred and fifty dollars or any other sum whatever.

8 And your orator further charges and avers upon information and belief that said defendant, David W. Minor, did not settle upon said land in good faith to appropriate it to his own exclusive use and benefit, but, on the contrary, he made said fraudulent proofs of pretended settlement, as hereinbefore set forth, with intent and purpose to sell the same and all thereof fraudulently to some person or persons to your orator unknown.

And your orator further avers and charges that on said twenty-third day of June, A. D. 1875, one Joseph Ohuit, at the request and procurement of said defendant, David W. Minor, made in the usual form an affidavit of pre-emption proof in support of the said pre-emption of the defendant David W. Minor, which affidavit, among other things stated and set forth in substance and effect that the said defendant, David W. Minor, had settled upon said lands on the 20th day of March, A. D. 1874, and

resided and made his home thereon from the 20th day of March, 1874, until the 23rd day of June, A. D. 1875, and that he had made certain improvements thereon of the value of one hundred and fifty dollars.

Which said affidavit was then and there duly subscribed and sworn to by said Joseph Ohuit, before said Chas. F. Roberts, the then duly qualified register of the land office of the United States, of the said Humboldt land district, California.

9 And your orator, on his information and belief, alleges and avers that said affidavit and proof of said Joseph Ohuit was in all respects false and untrue, and was fraudulently made for the purpose of misleading and deceiving said register and receiver of said Homboldt land office and the other officer of the Land Department of the United States to the end that said defendant, David W. Minor, might fraudulently obtain a patent to said lands.

And your orator, on his information and belief, further charges and avers that said defendant did not reside on said land or in any house or building situated thereon, from the twentieth day of March, one thousand eight hundred and seventy-four, until the twenty-third day of June, one thousand eight hundred and seventy-five, or at any time whatever during the period last mentioned, or at any other time.

And your orator, upon information and belief, further charges and avers that by reason of the said fraudulent acts of the defendant herein, and the false and fraudulent affidavits and testimony offered and presented to the register and receiver of the Land Office of the United States for the Humboldt land district, State of California, by the defendant herein as hereinbefore set forth, both such register and receiver were deceived and

10 misled to the manifest detriment of the United States of America, and they were, each of them, without suspicion of the false and fraudulent character of the said entry of the defendant, David W. Minor, and of the false and fraudulent character of the affidavits and testimony taken in support of settlement and proof of improvement, to issue the final receipt and final certificate to the defendant, David W. Minor, as hereinbefore set forth.

And your orator, upon information and belief, further charges and avers that upon the presentation of the final certificate of full payment by David W. Minor at the Land Bureau of the Department of the Interior, at Washington, the proper officers of said Department, without any suspicion of the false and fraudulent acts of the defendant herein, whereby and thereby the aforesaid certificate was issued, and being so misled and deceived on the fifth day of January, A. D. one thousand eight hundred and seventy-six, issued and subsequently delivered to the defendant herein, David W. Minor, a patent for the land hereinbefore set forth and described, to wit, the northwest quarter section No. eighteen (18), in township No. six (6) north, of range No. (2) two east, Humboldt meridian.

In support of the matters hereinbefore alleged your orator begs leave to refer to the aforesaid declaratory statement of the said defendant,

11 David W. Minor, to all of the affidavits, papers, documents, depositions, receipts, certificates, and proceedings had before said register and receiver of the land office of the United States for the Humboldt land district, State of California, so far as the same relates to the entry,

settlement, and improvement of the claim and proof of the said David W. Minor for that portion of the public lands of the United States as described and set forth in this bill of complaint to the field notes, surveys, maps, and records of the public lands of the United States, and also to the records of the Land Office of the Department of the Interior, at Washington, or to certified copies thereof, and to the records of the county of Humboldt, State of California, or to certified copies thereof, and to the several acts of Congress relative to the public lands of the United States.

Wherefore your orator prays relief and the decree of the court, that the patent to the land herein described be recalled and canceled, and that the said defendant, David W. Minor, be estopped from asserting any title to said land described in said patent, and that the money paid by the said defendant, David W. Minor, to the receiver of the Humboldt land district, State of California, on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five, and all right and title to the same be forfeited to the United States, and that the land described in the patent
12 declared to be public land of the United States, and that the said United States may have such other and further relief as may seem to the court to accord with the principles of equity.

May it please the court to grant to the United States the writ of subpœna issuing out and under the seal of this honorable court directed to David W. Minor, commanding him, on a day certain to be named therein, to be and appear in this honorable court to answer all and singular the premises, and to stand to and abide by and perform such other orders, directions, and decrees as may be made herein.

BENJAMIN HARRIS BREWSTER,
Attorney-General of the United States of America,
on behalf of the United States of America, Solicitor.

S. G. HILBORN,
United States Attorney, of Counsel.

(Endorsed:) Filed 19th June, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

13 *Subpœna.*

UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, district of California.
In equity.

The President of the United States of America, greeting, to David W. Minor:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first Monday of August, A. D. 1883, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the 107th.

{THE SEAL OF THE CIRCUIT COURT, DISTRICT OF CALA.}

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

14 *Memorandum pursuant to rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of August next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
District of California:

I hereby certify that I received the within writ on the 19th day of June, 1883, and personally served the same on the 25th day of June, 1883, by delivering to and leaving with David W. Minor, said defendant named therein, personally, at the county of Humboldt, in said district, an attested copy thereof.

M. M. DREW,
U. S. Marshal,
By B. J. AKERMAN,
Deputy.

SAN FRANCISCO, *June 28th*, 1883.

(Endorsed:) Filed July 2, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

15 *Demurrer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR, DEFENDANT.

The said defendant, David W. Minor, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein alleged, doth demur to said bill, and for cause of demur shows:

That said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for, or to any relief as against this defefendant D. W. Minor, as to the matters contained in said bill, or any of such matters.

Wherefore this defendant, David W. Minor, prays the judgment of this

honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained and asks to be hence dismissed.

J. J. DEHAVEN,
Solicitor for Defendant, D. W. Minor.

16 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. J. DEHAVEN,
Solicitor for Defendant.

(Endorsed:) Service of a copy of the within demurrer acknowledged. Aug. 27, 1883. S. G. Hilborn, U. S. attorney.

Filed August 29, 1883. L. S. B. Sawyer, clerk.

17 *Demurrer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA)
vs.)
DAVID W. MINOR.)

The defendant, David W. Minor, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein alleged, doth demur to said bill, and for cause of demurrer shows:

That said complainant hath not in and by its said bill made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for, or to any relief as against this defendant, David W. Minor, as to the matters contained in said bill, or any of such matters.

Wherefore this defendant, David W. Minor, prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and asks to be hence dismissed, with his reasonable costs in this behalf sustained.

J. J. DE HAVEN,
Solicitor for Defendant D. W. Minor.

18 STATE OF CALIFORNIA,
County of Humboldt, ss:

David W. Minor, being duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing demurrer, and that the said demurrer is not interposed for delay.

DAVID MINOR.

Subscribed and sworn to before me this fifth day of February, 1884.
[NOTARIAL SEAL.] GEO. W. HOPKINS,
Notary Public.

I do hereby certify that, in my opinion, the foregoing demurrer in the above-entitled case is well founded in point of law.

J. J. DE HAVEN,
Solicitor for Defendant D. W. Minor.

(Endorsed:) Copy served this 4th day of April, 1884. S. G. Hilborn' U. S. attorney, per Jewett.

Filed April 4, 1884. L. S. B. Sawyer, clerk.

19 At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorable George M. Sabin, U. S. district judge of Nevada.

Order of court.

THE UNITED STATES OF AMERICA
vs.
D. W. MINOR. } No. 3026.

By consent of the respective counsel it is ordered that the demurrer herein be, and the same hereby is, submitted to the court for consideration and decision. And the same having been duly considered, it is ordered that said demurrer be, and the same hereby is, sustained.

It is further ordered that the complainant herein be and it is granted thirty days in which to amend its bill of complaint herein.

20 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 13 day of May, A. D. 1884.

{THE SEAL OF THE CIRCUIT COURT, DISTRICT OF CALA.}

L. S. B. SAWYER,
Clerk,
By F. D. MONCTON,
Deputy Clerk.

21 *Amended bill of complaint.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR. }

Benjamin Harris Brewster, Atttorney-General of the United States, on behalf of the United States of America, upon leave of the court first had and obtained, brings this his amended bill in equity against David W.

Minor, a resident of the county of Humboldt, State and district of California, and therefore complains and says:

That upon the first day of April, one thousand eight hundred and seventy-two, the west half of the northwest quarter and the west half of the southwest quarter of section eighteen, township six north, range two east, Humboldt meridian, was unsurveyed public land of the United States, and on that day, your orator alleges, upon information and belief, one Richard Spence entered upon said land and premises with the bona fide intention of pre-empting the same under the laws of the United States as soon as said lands were duly and legally surveyed and open to pre-emption, as he lawfully might.

22 And your orator, further complaining, alleges, upon information and belief, that on the twenty-second day of October, one thousand eight hundred and seventy-four, the approved plat of the survey of said township was filed in the office of the register of the Humboldt land district, State aforesaid, the land district in which said lands are situate, and that thereupon and thereafter the said lands were open to pre-emption and settlement to all qualified pre-emptors.

And your orator, upon information and belief, charges and avers that on the third day of December, one thousand eight hundred and seventy-four, the said Richard Spence, under and in pursuance of the several acts of Congress of the United States, passed for the purpose of subjecting certain public lands of the United States to the right of pre-emption entry under the restrictions, conditions, and stipulations as in said cases provided, filed in the land office of the United States, at Eureka, State and district of California, a pre-emption declaratory statement for the said lands last above described, to wit, the west half of the northwest quarter, and the west half of the southwest quarter of section eighteen township six north, range two east, Humboldt meridian, in the district of lands subject to entry and sale in the land district of Humboldt, State and district of California, containing one hundred and sixty acres of land, of the public lands of the United States; the said Richard Spence alleging in said declaratory statement settlement on said land on

23 the first day of April, one thousand eight hundred and seventy-two, that the said Richard Spence was a citizen of the United States, over twenty-one years of age, and the head of a family; that he intended to claim said lands as a pre-emption right under the provisions of the said several acts of the Congress of the United States in that behalf made and provided.

That all the said facts so as aforesaid set forth in said declaratory statement were and are in all respects true.

And your orator, upon information and belief, further charges and avers, that immediately after said filing as aforesaid the said Richard Spence erected a good, habitable, and comfortable dwelling-house upon said lands, inclosed about thirty acres and cleared and cultivated several acres thereof, and from thence hitherto has openly and notoriously resided upon, cultivated, and improved said lands, and does now openly and notoriously inhabit, cultivate, and improve the same, and has in all matters and things complied fully with all the requirements of the several acts of the Congress of the United States relating to the pre-emption of the public lands of the United States, and were it not for the acts of the said defendant herein-

after set forth would be enabled, as he is entitled to, receive a patent to all said lands from the Government of the United States.

And your orator, upon information and belief, charges and avers,
24 that on the third day of January, one thousand eight hundred and seventy-eight, the said Richard Spence, by and with the consent of the Land Department of the United States, and in pursuance of section two thousand two hundred and eighty-nine of the Revised Statutes of the United States, transmuted his said pre-emption right into a homestead entry, and from thence forward held and still holds the said lands as a homestead claim. That thereafter, and on the fifth day of April, one thousand eight hundred and eighty, at the land office of the United States, at Eureka, Humboldt County, State and district aforesaid, the said Richard Spence made the following affidavit of final homestead proof before C. F. Roberts, esq., who was then and there the duly qualified register of said land office of the United States, and as such officer duly empowered to administer said oath to Richard Spence, which said affidavit was in the words and figures following, to wit:

PRE-EMPTION HOMESTEAD AFFIDAVIT.

I, Richard Spence, having changed my pre-emption declaratory statement No. 2111, filed the 3rd day of Dec., 1874, alleging settlement on the 1st day of April, 1872, for the west half of the NW. ¼ and the west half of the SW. ¼ Sec. No. 18, in township No. 6, of range No. 2 E., H. M. to homestead entry original No. ——, district of lands subject to entry at Eureka, Humboldt Co., under the acts of Congress approved
25 March 3, 1877, and May 27, 1878, do solemnly swear that I have never had the benefit of any right of pre-emption under section 2259 of the Revised Statutes of the United States; that I have not heretofore filed a pre-emption declaratory statement for another tract of land; that I was not the owner of three hundred and twenty acres of land in any State or Territory of the United States at any time during the above-mentioned period of settlement under the pre-emption statutes; that I did not remove from my own land within the State of California to make the settlement above referred to; nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my exclusive use or benefit; and that I did not during the period of pre-emption settlement above mentioned, directly or indirectly, make any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except myself.

RICHARD SPENCE.

I, C. F. Roberts, of the land office, Eureka, Humboldt land district, hereby certify that the above affidavit was subscribed and sworn to before me this 5th day of April, 1880.

C. F. ROBERTS,
Register Humboldt Land District.

26 and produced the usual and necessary proof before said officer of habitation, cultivation, and improvements upon said lands in accordance

with the provisions of the said Revised Statutes and the rules and regulations of the Land Department of the United States and to the satisfaction of said Department, and paid to the said United States all its fees and charges in that behalf required, and from thence hitherto the said Richard Spence has been and now is the equitable owner of said land, and as between the United States and the said Richard Spence, entitled to the patent therefor from the United States, and were it not for the false and fraudulent acts, affidavits, and proofs of said defendant hereinafter fully set forth, the said United States would issue its said patent for and grant said lands to the said Richard Spence.

And your orator further complaining against said defendant charges and says:

That on the 23d day of October, A. D. one thousand eight hundred and seventy-four, in pursuance of the several acts of Congress of the United States passed for the purpose of subjecting certain public lands of the United States to the right of pre-emption entry under the restrictions, conditions, and stipulations as in said cases provided, the defendant herein, David W. Minor, filed in the land office of the United States at Eureka, Humboldt County,
State and district of California, a pre-emption declaratory statement
27 for the northwest quarter of section eighteen, township six north,
range two east, of Humboldt meridian, in the district of lands subject to sale in the land district of Humboldt, State and district of California, containing one hundred and sixty acres of land of the public lands of the United States, the said David W. Minor alleging in said declaratory statement settlement on said land, on the twentieth day of March, A. D. one thousand eight hundred and seventy-four. That on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five, at the land office of the United States, at Eureka aforesaid, State and district California, the defendant, David W. Minor, made the usual affidavit of pre-emption proof, before C. F. Roberts, esq., who was then and there the duly qualified register of said land office of the United States, and duly empowered to administer the oath to the said David W. Minor, which said affidavit, among other things, set forth that he, the affiant, had made settlement on said land hereinbefore described; that he had settled upon said land on the twentieth day of March, one thousand eight hundred and seventy-four, and that he had improved said land; that he had built a house thereon and with his family continued to reside thereon, from the time of his settlement, until twenty-third day of June, A. D. one
thousand eight hundred and seventy-five, and cultivated a portion
28 of said northwest quarter of section eighteen. That said affidavit was then and there duly subscribed and sworn to by the said David W. Minor, at Eureka aforesaid, State and district of California, before C. F. Roberts, esq., the then duly qualified register of the land office of the United States for the Humboldt district, State of California.

Your orator further complaining, says that on the same day, to wit, on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five, the defendant herein, David W. Minor, paid to Solomon Cooper the duly qualified receiver of the land office of the United States, at Eureka, Humboldt land district, State of California, the sum of
dollars, being a payment in full for the same land herein described, that is to say, public land of the United States, known and described as the

northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, containing one hundred and sixty acres of land, at one dollar and twenty-five cents for each acre, being payment for the same tract of land hereinbefore described, and which was the subject of pre-emption proof before said land register.

That on the same day, as herein set forth, to wit, on the twenty-third day of June, A. D. one thousand eight hundred and seventy-five,
29 the register of the land office for the said land district issued to the said David W. Minor, defendant herein, a certificate of purchase, for the same portion of the public lands of the United States, to wit, the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, containing one hundred and sixty acres of land lying, and being in the county of Humboldt, State of California, being the same tract of land hereinbefore described, and which was the subject of pre-emption proof before the said land register, on the same day as hereinbefore set forth.

And your orator, further complaining, says that on the fifth day of January, A. D. one thousand eight hundred and seventy-six, the Government of the United States issued and delivered to the defendant, David W. Minor, a patent for the land herein described, to wit, the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, containing one hundred and sixty acres of land lying in the county of Humboldt, State of California, which said patent is now outstanding.

And your orator, upon information and belief, charges and avers that the entry and pretended settlement of said defendant, David W. Minor, of the land described herein, and the proof of settlement and improvements, were not made and offered as aforesaid in good faith, but, on
30 the contrary, were false, fraudulent, and illegal, and that the oath of the said David W. Minor, on the twenty-third day of June, one thousand eight hundred and seventy-five, before C. F. Roberts, the said register of the land office of the United States for the Humboldt district, State of California, was taken, subscribed, and sworn to falsely in the premises.

And your orator, upon information and belief, further charges and avers that said defendant, David W. Minor, did not make actual settlement upon the land hereinbefore described on the said twentieth day of March, A. D. one thousand eight hundred and seventy-four, or at any other time whatsoever, to wit, upon the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, containing one hundred and sixty acres of land. That said defendant did not reside on said land, or in any house or building situated thereon, or any part thereof, from the twentieth day of March, one thousand eight hundred and seventy-four, until the twenty-third day of June, one thousand eight hundred and seventy-five, or at any time whatever during the period last mentioned, or at any other time, nor did he cultivate any portion thereof.

And your orator further avers, upon information and belief, that said defendant, during the whole of the period last mentioned, resided
31 at the village of Arcata, in the county of Humboldt, State of California, at a distance of not less than about twelve miles from land hereinbefore described as the pre-emption claim of said defendant.

And your orator, upon information and belief, further charges and avers that by reason of the said fraudulent acts of the defendant herein, and the false and fraudulent affidavits and testimony offered and presented to the register and receiver of the land office of the United States for the Humboldt land district, State of California, by the defendant herein, as hereinbefore set forth, both such register and receiver were deceived and misled to the manifest detriment of the United States of America, as well as the said Richard Spence, and they were each of them without suspicion of the false and fraudulent character of the said entry of the defendant, David W. Minor, and of the false and fraudulent character of the affidavits and testimony taken in support of settlement and proof of improvement and cultivation to issue the final receipt and final certificate to the defendant, David W. Minor, as hereinbefore set forth.

And your orator, upon information and belief, further charges and avers that upon the presentation of the final certificate of full payment by David W. Minor at the land bureau of the Department of the Interior,
32 at Washington, the proper officers of said Department, without any suspicion of the false and fraudulent act of the defendant herein, whereby and thereby the aforesaid certificate was issued, and being so misled and deceived, on the fifth day of January, A. D. one thousand eight hundred and seventy-six, issued and subsequently delivered to the defendant herein, David W. Minor, a patent for the lands hereinbefore set forth and described, to wit, the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian.

And your orator, upon information and belief, further charges and avers that by reason of the said several filings of the said Richard Spence and the said defendant, David W. Minor, as aforesaid, hereinbefore more fully set forth, there arose a conflict between the said Richard Spence and the said David W. Minor before the said register and receiver of the said Humboldt land district over the right to purchase from the Government of the United States the west half of the said northwest quarter of said section eighteen, township six north, range two east, Humboldt meridian.

That on the twenty-third day of June, one thousand eight hundred and seventy-five, at the time and place when and where the said David W. Minor made, and the said C. F. Roberts, register as aforesaid, re-
33 ceived, the said affidavit of final pre-emption proof and allowed said entry for the said northwest quarter of said section eighteen, township six north, range two east, Humboldt meridian, as aforesaid; the said C. F. Roberts, register as aforesaid, received said final pre-emption proofs and allowed said entry and issued the said certificate of purchase under an entire misapprehension of the records of his office; that said C. F. Roberts, register as aforesaid, at the time and place last aforesaid, did not know of the rights and equities of the said Richard Spence, as hereinbefore set forth, and did not know the right of said Richard Spence to contest said final pre-emption proofs of said David W. Minor before said C. F. Roberts, as register as aforesaid, but received said final proofs and allowed said entry and issued the said certificate of purchase to said defendant, believing and acting under the belief that no other person had any rights to, or equities or interests in, the north half of the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian.

And your orator, upon information and belief, further charges and says, that on the twenty-third day of June, one thousand eight hundred and seventy-five, at the time and place when and where the said Solomon Cooper, receiver as aforesaid, received from said defendant the full payment for the northwest quarter of section eighteen, township six
34 north, range two east, Humboldt meridian, as hereinbefore set forth, the said Solomon Cooper, receiver as aforesaid, believed and and received said money, acting under the belief that said David W. Minor alone, and no other person had a lawful right to purchase said land last above described, and received the same in ignorance of the rights and equities of the said Richard Spence as hereinbefore fully set forth.

And your orator, upon information and belief, further charges and says, that on the fifth day of January, one thousand eight hundred and seventy-six, the Land Bureau of the Department of the Interior at Washington were without knowledge of the rights and equities of said Richard Spence in and to the land last-above described as hereinbefore fully set forth, and believing and acting under the belief that the said David W. Minor was the only person entitled to purchase said land upon the presentation to them of the final certificate of full payment for said land by said David W. Minor, issued the patent to said David W. Minor for the whole of the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian.

And your orator, upon information and belief, further charges and avers, that the said David W. Minor upon the presentation of his said final proofs to said register as aforesaid, and upon the full pay-
35 ment by said defendant for said land to said receiver as aforesaid, and upon presentation to the Land Bureau of the Department of the Interior at Washington, for the said final certificate of full payment for said land, by said defendant, as aforsaid, the said defendant, David W. Minor, well knew of all the rights and equities of the said Richard Spence in and to the west half of the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, as hereinbefore fully set forth, but fraudulently, wickedly, and maliciously intending to cheat and defraud the Government of the United States as well as the said Richard Spence, witheld from the said land officers of the United States, at the several times and places hereinbefore set forth, his knowledge of the said rights and equities of said Richard Spence, and fraudulently and wickedly, at the time and place aforesaid, presented his said false and fraudulent final proof and payment for the whole of the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, and received patent therefor.

And your orator further charges and avers, that had the said David W. Minor not made and filed with said register the said false and fraudulent affidavits as to his residence and settlement upon and cultivation of the land last above-described as aforesaid, and had the said defendant not fraudulently withheld from the several officers of the Bureau of the Department of the Interior his knowledge of the rights and equities of the said
36 Richard Spence, as hereinbefore set forth, the Government of the United States would have granted to said Richard Spence its patent for the lands first hereinbefore described, to the exclusion of the said defendant and all other persons.

And your orator further charges and avers, that several times prior to the filing of this bill in equity the United States have demanded of said David W. Minor that he surrender up to the United States the said patent so issued to him as aforesaid, for the northwest quarter of section eighteen, township six north, range two east, Humboldt meridian, for cancellation, and further avers that the United States is willing and desires to issue to said Richard Spence, as the equitable owner thereof, by reason of the matters and things hereinbefore set forth, a patent to the west half of the northwest quarter and the west half of the southwest quarter of section eighteen, township six north, range two east, Humboldt meridian, but is unable to do so by reason of the said patent so as aforesaid issued to said defendant, David W. Minor, for the whole of the northwest quarter of section eighteen, township and range aforesaid.

In support of the matters hereinbefore alleged, your orator begs leave to refer to the aforesaid declaratory statements of the said defendant, David W. Minor, and Richard Spence to all of the affidavits, papers, documents, depositions, receipts, certificates, and proceedings had before said
37 register and receiver of the land office of the United States for the Humboldt district, State of California, so far as the same relates to the entry, settlement, and improvement of the claim, and proof of the said David W. Minor and Richard Spence for that portion of the public land of the United States as described and set forth in this bill of complaint, to the field-notes, surveys, maps, and records of the public lands of the United States; and also to the records of the land office of the Department of the Interior, at Washington, or to certified copies thereof, and to the records of the county of Humboldt, State of California, or to certified copies thereof, and to the several acts of Congress relative to the public land of the United States.

Wherefore your orator prays relief, and the decree of the court that the patent to the lands herein described be recalled and cancelled, and that the said defendant, David D. Minor, be estopped from asserting any title to the west half of the said land described in said patent, and that the money paid by the said defendant to the receiver of the Humboldt land district, State of California, on the 23d day of June, A. D. one thousand eight hundred and seventy-five, and all right and title to the same be forfeited to the United States; and that the east half of the land described in the patent be declared to be public land of the United States.

And that the United States may have such other and further
38 relief as may seem to the court to accord with the principles of equity.

BENJAMIN HARRIS BREWSTER,
Attorney-General, Solicitor for Petitioner.

S. G. KILBORN,
United States Attorney, of Counsel.

(Endorsed:) Service of copy of the within amended bill of complaint is hereby waived this 5th day of May, A. D. 1884. J. J. DeHaven, solicitor for def't.

Filed May 6, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

39 *Demurrer to amended bill.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA }
vs. }
DAVID W. MINOR. }

The defendant, David W. Minor, by protestation, not confessing all or any of the matters and things in the said complainant's amended bill of complaint contained to be true in such manner and form as the same are therein alleged, doth demur to said amended bill, and for cause of demurrer, shows:

1st. That said complainant hath not in and by its amended bill made or stated such a case as doth or ought to entitle it in a court of equity to any such relief as is thereby sought and prayed for, or to any relief as against this defendant, David W. Minor, as to the matters contained in said amended bill or any of such matters.

2d. That said complainant is not entitled to any relief in a court of equity by reason of any of the facts alleged in said amended bill, because it appears therefrom that complainant has been guilty of laches and unreasonable delay in permitting so great a length of time to elapse before commencing this action.

Wherefore this defendant, David W. Minor, prays the judgment
40 of this honorable court whether he shall be compelled to make any further or other answer to the said amended bill or any of the matters and things therein contained, and asks to be hence dismissed, with his reasonable costs in this behalf sustained.

J. J. DEHAVEN,
Solicitor for Defendant D. W. Minor.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

J. J. DEHAVEN,
Solicitor for Defendant D. W. Minor.

The affidavit of the defendant, to the effect that the foregoing demurrer is not interposed for delay, is hereby waived.

S. G. HILBORN,
United States Attorney.

(Endorsed:) Copy served this 7th day of May, A. D. 1884. S. G. Hilborn, United States attorney.

Filed May 7, 1884. L. S. B. Sawyer, clerk.

41 *Order.*

At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and

county of San Francisco, on Tuesday, the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorable George M. Sabin U. S. district judge, Nevada.

THE UNITED STATES OF AMERICA
vs.
D. W. MINOR. } No. 3026.

The demurrer of the defendant to the complainant's amended bill of complaint herein, heretofore submitted to the court for consideration and decision, having been duly considered and the court being opposed in opinion, the opinion of the presiding judge prevailing, it is ordered that said demurrer be, and the same hereby is, sustained, and that the said amended bill be dismissed.

42 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 13th day of May, A. D. 1884.

{ THE SEAL OF THE CIRCUIT COURT, DISTRICT OF CALA. }

L. S. B. SAWYER,
Clerk,
By F. D. MONCTON,
Deputy Clerk.

43 *Decree.*

United States circuit court ninth circuit district of California.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DAVID W. MINOR, RESPONDENT. } No. 3026.

The complainant filed its bill of complaint herein on the 19th day of June, 1883, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the first Monday of August A. D. 1883, which is hereto annexed. On the 29' day of August, 1883, a demurrer was filed herein, which is hereto annexed.

On the 4' day of April, 1884, another demurrer was filed herein, which is hereto annexed.

On the 7' day of April, 1884, an order on the demurrer was made and entered herein, a certified copy of which order is hereto annexed.

On the 6th day of May, 1884, an ammended bill of complaint was filed herein, which is hereto annexed. A demurrer to said amended bill of complaint was filed herein on the 7' day of May, 1884, which is hereto annexed.

Thereafter, to wit, on the 13th day of May, 1884, an order on said demurrer to said amended bill of complaint was made and entered
44 herein, a certified copy of which order is hereto annexed, and on said 13th day of May, 1884, a decree was filed and entered herein in the words and figures following, to wit:

At a stated term, to wit, the February term, A. D. 1884, of the circuit

court of the United States of America, of the ninth judicial circuit, in an
for the district of California, held at the court-room in the city and coun
of San Francisco, on Tuesday, the 13th day of May, in the year of ou
Lord one thousand eight hundred and eighty-four.

Present: The honorable Lorenzo Sawyer, circuit judge; the honorab
George M. Sabin, district judge, district of Nevada.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR. } No. 3026.

The court having sustained the defendant's demurrer to the complai
ant's amended bill of complaint herein, and ordered that said bill be di
missed.

Thereupon, upon consideration thereof, it is ordered, adjudged, and d
creed that the said complainant's bill be, and the same hereby is, dismisse

LORENZO SAWYER,
Presiding Judge.

(Endorsed:) Filed and entered May 13, 1884. S. S. B. Sawyer, clerk

45 *Clerk's certificate.*

Whereupon said pleadings, subpœna, order, and decree are hereto an
nexed, said decree being duly signed, filed, and enrolled, pursuant to th
practice of said circuit court.

Attest, etc.:

THE SEAL OF THE CIRCUIT COURT, DISTRICT OF CAL'A.

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Enrolled papers.

Filed May 13, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, dep
uty clerk.

46 At a stated term to wit, the February term, A. D. 1884, of th
circuit court of the United States of America, of the ninth jud
cial circuit, in and for the district of California, held at the court-room i
the city and county of San Francisco, on Monday, the 12th day of May
in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge; the honorab
George M. Sabin, district judge.

Opposition of opinion.

UNITED STATES
vs.
DAVID W. MINOR. } No. 3026.

This cause was heard on demurrer to the amended bill in equity, whic
said amended bill and the demurrer thereto are hereby referred to an
made a part of this certificate, and the clerk is hereby directed to certif
copies of said amended bill and the demurrer thereto as a part of this ce
tificate of opposition of opinion.

At the hearing of said cause at the present term of said court upon the said amended bill and demurrer thereto, there occurred as questions arising on said amended bill and demurrer, the following:

47 I. Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating the patent in question are frauds extrinsic and collateral to the matter tried and determined in the land office upon which the patent issued and constitute such frauds as entitle the complainant to relief in a court of equity?

II. Whether perjury and false testimony in a proceeding before the land office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud as will require a court of equity to vacate the patent on that ground alone?

III. Whether the decision and determination of the questions involved on false and perjured testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States on a bill filed to vacate the patent so issued?

IV. When the United States files a bill to vacate a patent, on the ground that it was fraudulently obtained upon false testimony, as alleged in said amended bill, whether it is necessary to offer in the bill to return the purchase-money paid for the land by the patentee?

V. Whether a court of equity will enforce the penalties and forfeitures imposed by section 2262 of the Revised Statutes of the United States, for obtaining a patent to land upon false affidavits.

VI. Whether the remedy at law provided by said section and an indictment for perjury are not the only remedies for the wrong alleged in the amended bill?

48 VII. The bill of complaint having been originally filed in this case on June 19, 1883, more than seven years and five months after the issue of the patent, whether the claim to vacate the patent on the ground of fraud is stale, and whether the bill ought to be dismissed on that ground.

VIII. Whether the demurrer to the said amended bill should be sustained?

Upon which said several questions and upon each of them the opinions of the judges were opposed.

And the opinions of the judges being so opposed, in pursuance of the statutes in such case made and provided, that the opinion of the presiding judge shall for the time being prevail, and judgment be entered in accordance therewith, it was thereupon, in accordance with the opinion of the presiding judge, for the reasons expressed in the opinion filed herein, ordered that the demurrer to said amended bill be sustained, and said amended bill be dismissed.

Whereupon, on motion of S. G. Hilborn, esq., United States attorney, on behalf of the complainant, that the several points on which the disagreement has happened may during the term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court of the United States, to be finally decided, it is ordered that the foregoing statement of the record upon which the case was heard, and of the facts which is made under the direction of the judges, be entered of

49 record and certified accordingly, at the request of the said counsel for complainants, and in pursuance of the law in such case made and provided.

May 15, 1884.

LORENZO SAWYER,
Circuit Judge.
GEO. M. SABIN,
Dist. Judge.

Endorsed: Filed and entered May 15, 1884. L. S. B. Sawyer, clerk.

50 *Opinion.*

Circuit court of the United States, ninth circuit, district of California.

UNITED STATES *vs.* MINOR. } Opinion of the circuit judge on certificate of opposition.

SAWYER, circuit judge.

In July, 1883, I decided the case of the United States vs. White, in which the demurrer to the bill was sustained and the bill dismissed.

That case presented the principal question decided for the first time and was similar in all respects except in that case it did not appear that any private party had acquired, or attempted to acquire, any right in the land patented. But as the United States are the only parties to the record I do not perceive that the interests of adverse pre-emption claimants can affect the decision on the points determined. If that case was correctly decided, then the demurrer in this case must be sustained, for the reasons then given, and a copy of the opinion in White's case will be filed as showing the grounds of the decision in this case.

I do not feel entirely certain that I have not carried the doctrine established in U. S. vs. Throckmorton, Vance v. Burbank, and Smelting Co. v. Kemp, too far. But upon the whole, I think not. If the case of
51 White and the present case are distinguishable from Throckmorton's case it must be on the ground that the United States did not appear as a formal party by its attorney in this and in White's case, and contest the claim made, and consequently did not have its day in court in such sense as to make the point res adjudicata. But the United States did not appear in the matter out of which the case of Vance vs. Burbank arose. The question in both cases was investigated and decided by officers of the United States especially authorized to determine upon evidence the questions of fact in favor of or against the Government and parties claiming through the United States. The United States were thus represented by their own officers empowered to determine the matter on their behalf. No complicity on the part of the officers is averred in this case. If the allegations of the bill be true they have simply relied upon wilfully false testimony as in other cases decided by the courts upon perjured testimony and the fraud is not in a matter extrinsic to the matter decided.

If the United States are bound, so far as their intent are concerned, it may possibly still be that any person who had acquired and still held a valid pre-emption right prior and superior to the right of the patentee would

not be bound. If so the legal title in that case has passed from the United States to the patentee charged with the equitable right of the party having a better right, and he might maintain a bill in his own name to control the title for his own benefit, and that would seem to be the proper
52 proceeding. If such a right could be enforced it would be because the party having the better right is not bound to take notice of what is going on in the Land Office, and he has not had an opportunity to be heard; has not had his day in court. He would thus stand in a better position than the United States, because his right attached against the United States themselves, as well as against the patentee, before the proceeding for a patent were commenced; and his right, if the required conditions have been performed, could not be affected without legislation by any action of the Land Office. He could not be affected by a proceeding to which he was not a party. As the proceedings in the Land Office resulting in a patent are subsequent to the attaching of his right, he is not in priority with the United States in the subsequent proceedings for a patent. His right would be adverse to the patentee. But is he not bound to take notice of the proceedings in the Land Office resulting in a patent?

If so, there does not appear to be any good reason why he should not be bound by them.

It may well be said that a pre-emptioner only takes such right as the statute gives him, and that those rights are taken subject to the methods appointed by the statute for ascertaining to whom a patent should issue, and to the issue of patents in the mode appointed; that he can be entitled to only such notice as the statute itself provides, and
53 that upon this ground the regular issue of a patent is conclusive. And this seems to me to be the proper view. In this view it would not matter whether any notice is provided for or not. He would be in no better position than the United States.

The act of 1879 (1 Sup., 470) expressly requires the applicant for a pre-emption or homestead entry to file with the register of the land office notice of his intention to prove up his claim, giving a description of the land, names of his witnesses, &c., and the register must give public notice of the same by publication in the nearest newspaper, and by posting for thirty days before the final proofs can be made. Whatever the legal status of the case with respect to parties claiming prior rights may have been before, it may well be claimed that the proceedings under this act is in the nature of the proceeding in rem., of which everybody is bound to take notice, and that parties claiming to have acquired a prior right have due notice, and, as well as the United States, are bound by the action of the Land Office in regularly issuing a patent in pursuance of the modes and forms prescribed by the statute.

These observations are made for the purpose of suggesting the points for the consideration of the Supreme Court rather than for the purpose of indicating the view adopted by me in deciding the case.

When the case of White and the three others disposed of at the
54 same time were decided, that *that* being the first time the precise main question arose, I was anxious to have these case' taken to the Supreme Court at once for an authoritative decision of the points involved, and supposed it would be done; but greatly to my disappointment it was

found that the value of the property involved was not sufficient to give the Supreme Court jurisdiction. No case of the kind is likely to occur soon involving property of the value of $5,000. A quarter-section of Government land at the time of pre-emption is rarely worth so much. A number of bills of a similar character have since been filed in this court, and a multitude of others are likely to follow, if it is finally decided that the bill can be maintained. It is of the utmost importance therefore to the interests of justice, the stability of titles, and the peace of the community that the questions presented be correctly and promptly settled.

It is my present purpose to withhold the decision in all other cases presenting similar questions until this case is decided by the Supreme Court.

The question as to when a claim of this kind becomes stale, so as to justify a court of equity in refusing to entertain a bill of the kind, is also important. Courts sometimes adopt the statutes of limitations by analogy as to the time when the claim should be deemed stale. There is no statute of limitation of the United States to furnish the analogy. If under section 721, R. S., the statute of the State of California may be adopted,
55 then a suit of the kind on the ground of fraud would be barred in three years in the case of a private party. Thus, if a party having a prior right has lost it by the issuing of a patent upon perjured testimony without his having appeared before the land office to contest the right to a patent, can maintain a bill to control the title for his use, it is necessary to file his bill within three years after discovering the fraud. But the bill in this circuit, at least, is never filed by the party instigating the proceeding to vacate a patent thus issued. The Attorney-General is induced to allow the suit to be brought by the United States, under the sanction of his name and authority, the party procuring it to be brought, giving a bond to the United States to secure the payment of all the costs of the litigation. The management of the case is thereupon, in fact, in practice, under the general supervision of the United States attorney for the district, entrusted to the private counsel of the party procuring the suit to be brought and indemnifying the Government. If the party in whose interest the suit is usually brought can thus use the name of the United States for his own purposes in a suit which he could and should bring in his own name then he can evade the limitation unless such a case should be deemed stale as to the United States under the same circumstances and conditions as when applicable to individuals. Long experience suggests that there is a strong tendency in parties to settle on the public lands, despoil them of
56 their timber or valuable metals, and neither enter the lands themselves nor leave them in a condition for others to enter. If such parties finally lose the land by their wilful delay or negligence, they are entitled to little sympathy. It has more than once come to my knowledge judicially, that pre-emption claims are often filed, the land despoiled of all that is valuable, the claims then abandoned, and the operation repeated on other lands.

This case, upon the allegations of the bill, affords an instance of unaccountable negligence and want of attention to what is going on around him on the part of Spence, in whose interest the suit appears to have been brought.

According to the bill, Spence, on April 2, 1872, settled upon one eighty of the quarter-section patented. The approved plots of survey were filed

October 2, 1874. On December 3, 1874, Spence filed his pre-emption declaratory statement for one hundred and sixty acres of land, including the eighty so occupied, erected a house and other improvements, and continued to reside thereon. On January 31, 1878, he transmitted his pre-emption into a homestead entry, and has since held as a homestead claimant. On April 5, 1880, he filed the necessary affidavit and made the necessary proofs of his homestead claim, and thereby claimed to become the equitable owner of the land and entitled to a patent. It further appears that defendant Minor, on October 23, 1874, filed his declara-
57 tory statement for pre-emption claim to a quarter-section embracing the eighty so settled upon by Spence in 1872, alleging a settlement on March 20, 1874. On June 23, 1875, he proved up his claim, paid for the land, and received his certificate of entry; and on January 6, 1876, he received his patent. Thus, according to the bill, while Spence was living on the eighty acres claimed by him, two and a half years after his settlement and subsequent to his filing his own declaratory statement, Minor filed his declaratory statement to eighty acres of the same land, proved his claim, and procured his patent two years before Spence transmuted his pre-emption into a homestead claim, and more than four years before Spence made his proofs; and this suit was not instituted till more than three years after Spence finally proved up, and nearly seven years and a half after the patent was issued to Minor. Such delay under such circumstances, it would seem, ought to render the claim stale.

Where relief is sought against a patentee of public lands, on the suggestion and on behalf of private parties, reasonable diligence should be required in seeking the relief, even in the name of the Government, if that mode be admissable. If there is such a fraud practiced on an adverse claimant as would justify a court in vacating the patent on a bill filed by the United States for his benefit, there is such fraud as would authorize the court to charge the legal title with a trust on his behalf upon a bill filed by himself; and possibly, as we have suggested, the
58 United States might be bound by the adjudication of the land office in cases where a claimant of a prior right might not be thus bound. In all such cases, in my judgment, it would be far better to leave the parties to litigate their own rights in their own names than for the United States to assume the litigation.

When the United States, upon being indemnified for costs, files a bill to vacate a patent, at the instance of an adverse claimant, with the sanction and in the name of the Attorney-General, as attorney of record, the case assumes an apparent dignity and importance which do not properly belong to it, and which it would not otherwise possess.

It would seem that if there is a duty imposed on the United States to bring the suit that duty would impose upon them the corresponding incidental duty to pay the costs.

I apprehend that the lands in such cases as this at the date of the fraudulent entries complained of are rarely worth enough to make it an object to litigate, and that an increase in value, arising from subsequent events or developments not anticipated at the date of the acts complained of, usually furnish the incentive to litigation afterwards instituted. In such cases parties should be required to act promptly.

At the request of the U. S. attorney, the points of opposition of opinion

will be stated by the court. In the mean time, in accordance with the views indicated in the foregoing observations, and in the opinion
59 in White's case, the demurrer will be sustained, and the bill dismissed; and it is so ordered.

May 13, 1884.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Rendered May 13, 1884. L. S. B. Sawyer, clerk.

60 *Opinion in U. S. v. White et al.*

In the circuit court of the United States, ninth circuit, district of California.

UNITED STATES *v.* GEO. E. WHITE.
UNITED STATES *v.* WM. P. WHITE.
UNITED STATES *v.* JOHN P. WHITE.
UNITED STATES *v.* L. B. TUTTLE ET AL.

1. *Jurisdiction—Fraud.*—The United States have jurisdiction to vacate a patent to land in a proper case on the ground of fraud.

2. *Fraud in procuring patent.*—The frauds for which courts will set aside a patent granted by the United States, in the regular course of proceedings in the land office, are frauds extrinsic, or collateral to the matter tried and determined, upon which the patent issued; and not fraud consisting of perjury in the matter on which the determination was made.

3. *Perjury and false testimony.*—In the proceeding, by means
61 of which a patent is secured by fraud, is not fraud extrinsic or collateral to the matter tried and determined in the land office within the meaning of the rule, and a patent will not be set aside on that ground alone.

4. *Perjury—Injury.*—Where no pecuniary injury to the United States is shown by the bill, and it does not appear that there is any other right in the land against the Government, whether a court of equity should set aside a patent obtained on false testimony, if otherwise proper, query?

5. *Return of purchase-money.*—Where the United States files a bill to set aside a patent on the ground that it was obtained upon false testimony, it should, at least, offer to return the purchase-money paid by the patentee for the land.

6. *Equity.*—When the United States comes into a court of equity, asking equity like a private person, it should do equity.

7. *Forfeiture—Equity.*—Courts of equity never enforce penalties or forfeitures.

8. *Forfeitures.*—If the United States desires to enforce the penalties and forfeitures imposed by section 2262 of the Revised Statutes for obtaining a patent to land upon false affidavits, it must do so by a proper proceeding at law where the party charged will be entitled to a trial of the charge by a jury.

Before Sawyer, circuit judge.

A. P. Van Duser for the United States.

L. D. Latimer and Barclay Henley for defendants.

SAWYER, circuit judge: The first of these cases U. S. *v.* Geo. E. White, is a bill in equity to vacate a United States patent issued to the defendant on the ground that it was obtained upon false and fraudulent affi-
62 davits and proofs, made under the pre-emption laws.

It is alleged that on May 6, 1876, the defendant filed a declaratory statement under the pre-emption laws upon a quarter-section of land situate in Humboldt County, described in the bill, and an affidavit stating that he had settled upon the land on November 5, 1873, and resided thereon ever since; that he had cultivated a portion as a garden, built a fence around about an acre, and built a house 9 by 12; that the improvements were of the value of $100, and that he was not the owner of 320 acres of land elsewhere.

It is further alleged that he paid the sum of two hundred dollars, and thereupon, and upon the making of said proofs, a certificate of purchase, in due form, was issued to said defendant; and afterward, in pursuance of said certificate of purchase, a patent was issued on Dec. 13, 1876. It is further alleged, upon information and belief, that said affidavits and proof were false; that defendant did not make the settlement as stated; did not reside upon said lands, and that he did 320 acres of land elsewhere; and on the grounds of the false representations and proofs, the complainants ask that the patent be vacated and canceled, and that the money paid be adjudged forfeited to the United States.

There are numerous cases wherein the Supreme Court of the United States has said, in general terms, that a patent might be vacated for fraud on a bill of equity filed by the United States, as Moore v. Robbins, 96 U. S., 533; Shepley v. Cowan, 9 U. S., 330, and numerous others too familiar to require citation. There can, therefore, be no question as
63 to the jurisdiction of the court to entertain such a bill where a proper case is presented; but it was never determined what kind of fraud, or in what form perpetrated, would furnish a proper case for the relief sought in this case, till the case of the United States v. Flint and U. S. v. Throckmorton, in this court, 4 Saw., 51–3, affirmed in U. S. v. Throckmorton, 98 U. S., 68. These were cases wherein a petition was filed under the act of 1851 before the board of land commissioners for confirmation of a Mexican grant, which had been confirmed. It was alleged in the bill that the grant presented was a fraud; that it had been fabricated in Mexico after the transfer of California to the United States; that the fraud was concealed from the Government officers and the board of land commissioners; and that the confirmation was obtained upon false and perjured testimony. On these grounds it was sought to vacate the patent in the first case, and the confirmation in the second, and annul the title. But the court decided that the confirmation could not be vacated on the ground that it was obtained wholly upon false and perjured testimony or for the palpable frauds alleged. The court held (affirming the views expressed by the circuit court in 4 Sawy., 51–3) that the frauds for which the judgments of tribunals could be impeached are "frauds extrinsic or collateral to the matter tried by the first court;" and do not extend "to a

fraud in the matter on which the decision is rendered." Said the court, after citing and commenting on the authorities:

" We think these decisions establish the doctrine on which we
64 decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was at issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. (98 U. S., 68.)

"The same rule was adopted in Vance v. Burbank, which also went up from this circuit, and the principal applied to the decision on a question of residence and of fraud, decided by the United States Land Office, where one private party sought to control, for his own use, the title granted to another, upon alleged frauds practiced while obtaining the patent. Said the court, by the Chief Justice, 'The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi-judicial tribunals are.'

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully
65 to the Department, so that it may properly be said there never has been a decision in a real contest about the subject-matter of inquiry. False testimony, or forged documents, even, are not enough, if the disputed matter has actually been presented to, or considered by, the appropriate tribunal. (United States v. Throckmorton, 98 U. S., 61; Marques v. Frisby, supra.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute.

"The operative allegation in this bill is of false testimony only. * * * No fraud is charged on the register and receiver or on the heirs of Perkins in respect to the keeping back of evidence. (Vance v. Burbank, 101 U, S., 519.)

" Thus the decisions of the land office on application for patents were put upon the same footing as judgments and decisions of courts and other tribunals like the Board of Land Commissioners. The only difference between this case and the others is that in the first the United States and in the other the complainant actually appeared, the United States not appearing, and were heard, while in this the United States did not formally appear as a contestant. But the principal is the same, only the mode of proceeding being different. In the Flint and Throckmorton cases the claimant, under his grant, the treaty with Mexico, and the statutes of the United States, petitioned the board for a confirmation of his grant. In this the purchaser, under and in conformity to the statutes, applied to the land office for leave to purchase, as did the party in Vance v. Burbank, and the land office

66 representing the United States, in due form heard the proofs and determined the question of the right to purchase. In Vance v. Burbank the complainant intervened in fact, as he had a right to do under the law, and contested the right of his opponent. But the United States was not a party in any sense, other than as a party in this case. So in the present case, anybody claiming an adverse interest had a right to intervene, but nobody seems to have done so. The proceeding was in the nature of a proceeding in rem., of which everybody takes notice. The hearing was regularly had, and decided in favor of complainant, White; and the only fraud, if any there was, was "in the matter on which the decision was rendered," and not "extrinsic or collateral to the matter tried" and determined in the Land Office.

The action of the Land Office is judicial in its nature. (Smelting Co. v. Kemp, 104 U. S., 640.) I can perceive no good reason why the principal should not apply to this case, as well as to the others, and especially to the case of Vance v. Burbank. That is the logical result of the principle established by the decision cited, and I think the principle sound, and upon the whole safe. Again, it is a principle that, with reference to private parties, a court of equity will not grant relief against a fraud, unless it appears that some damage or injury has been sustained by reason of the fraud; for "courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damages" (1 Sto. Eq., Ju. 203). And when the United States enters the court as a litigant,

67 * * * "it stands upon the same footing with private individuals" (U. S. v. Throckmorton, 4 Saw., 43). It does not appear that the United States has been pecuniarily injured by the alleged fraud. No injury or damage is alleged, or in any way shown. The land was for sale to any duly authorized pre-emptioner, at $1.25 per acre. Defendant paid the full amount of the purchase money, and it went into the U. S. Treasury. The Government got all that it would have obtained from any other party.

It does not appear that anybody else had any rights, or wanted to purchase, or that the United States was under any obligation to patent the land to any other person. There is no possible pecuniary injury to complainant. The most that can be said is, that a principle of public policy was violated, and thereby a moral wrong resulted, by reason of the legal disqualification under the pre-emption act, of complainant to purchase. But the wrong was only malum prohibitum, not malum per se. It is by no means clear that the demurrer ought not to be sustained on this ground, but it is unnecessary so to decide now, for, in my judgment, it is not a case to be taken out of the rule established in the cases cited, of Throckmorton and Vance.

In view of the notorious liberality in favor of purchasers, not to say looseness, with which the pre-emption laws have, ever since their adoption, been administered all over the Western States, to relax the rules referred to in the authorities cited, especially where no actual pecuniary damage or injury has resulted, either to the Government or private parties, and "retry every case in which" the action of the land office as well

68 as "judgments or decrees rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be

forged or fraudulent," would open a pandora's box of evils "far greater than any compensation arising from doing justice in individual cases." It would open the door to any party stimulated by malice, or other unworthy motive, who could upon ex parte and false statements, obtain the ear of the Attorney-General, to promote suits in the name of the United States to the great vexation of honest as well as dishonest pre-emptors, and to the great detriment of the public peace and prosperity.

Again, the claim is stale. Although statutes of limitation do not run against the Government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court. (U. S. v. Tichnor, 8 Saw., 156; U. S. v. Flint, 4 Saw., 58–9; Badger v. Badger, 2 Wall., 94; Stearns v. Page, 7 How., 829.) Under the State law this suit, if between private parties alone, would be barred within three years. (Manning v. San Jacinto Tin Co., 7 Saw., 430.) Six years elapsed between the issue of the patent and the filing of the bill, and no averment is made to show that the fraud was not discovered, or by the exercise of ordinary diligence in the land office might not have been discovered immediately after its consummation.

The money received is retained, and no tender appears to have
69 been made, nor is any offer to refund the money made in the bill.

The United States, like an individual, when it comes into court and demands equity must do equity, or at least offer to do equity. It has received the full value of the land in money—the same amount that it would have received had the land been sold and patented to an admittedly qualified purchaser. It can not keep the money and, in a court of equity, demand and receive a return of the land. To meet this point, and as a basis for a decree for forfeiture of the money as a part of the relief demanded in the bill, the U. S. attorney relies on section 2262, R. S., which provides, that "if any person taking such oath swears falsely in the premises he shall forfeit the money which he may have paid for such land and all right and title to the same."

This is highly penal, and the only remedy, or rather punishment, other than indictment, for perjury that appears to be provided by law for the wrong sought to be redressed. But the United States has come into the wrong forum to enforce this penalty. "It is a universal rule in equity never to enforce either a penalty or forfeiture." (2 Sto. Eq. Ju., secs. 1319, 1494, 1509.) So a bill of discovery will not lie in a case which involves a penalty or forfeiture. (Ib.) As an answer on oath is not waived this bill is in that particular a bill of discovery, and demurrable on that ground also. If the United States desires to enforce the penalties—the forfeiture of the money paid and the land patented—provided for in section 2262, R. S., cited, it must proceed in some appropriate mode at law, where the defendant will be entitled to a trial by a jury of the question as to giving false testimony.

In my judgment the demurrer should be sustained and the bill dismissed, and it is so ordered.

July 30, 1883.

(Endorsed:) Read in open court July 30, 1883. L. S. B. Sawyer, clerk.

70 *Order allowing an appeal.*

At a stated term to wit, the February term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Thursday, the 15th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The honorable Lorenzo Sawyer, circuit judge; the honorable George M. Sabin, U. S. district judge, Nevada.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR.

On motion of Carroll Cook, esq., assistant U. S. attorney, on behalf of the United States, it is ordered that an appeal from the decision
71 rendered by the presiding judge and the order sustaining the demurrer to the amended bill of complaint herein made and entered on the 13th day of May, A. D. 1884, being a day in the February term, A. D. 1884, of said circuit court, to the Supreme Court of the United States, be, and the same hereby is, allowed, and that a certified transcript of the pleadings, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States.

72 In the circuit court of the United States for the district of California.

THE UNITED STATES OF AMERICA
vs.
DAVID W. MINOR. } No. 3026.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing seventy-one written pages, numbered from 1 to 71 inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said circuit court, this 9th day of July, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

73 UNITED STATES OF AMERICA, *ss:*

To David W. Minor, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1884, pursuant to an order granting an appeal to said Supreme Court of the United States, made and entered by the circuit court of the United States for the district of California, in the cause entitled The United States of America against David W. Minor, and you are defendant in error, to show cause, if any

there be, why the decree in the said order mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 8th day of July, A. D. 1884, and of the Independence of the United States the one hundred and eighth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

74 Service of the within citation and receipt of the copy thereof admitted, this 9th day of July, 1884.

J. J. DEHAVEN,
Attorney for Defen't David W. Minor.

(Indorsed:) No. 3026. In the Supreme Court of the United States. The United States of America vs. David W. Minor. Citation. Filed July 9, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clek.

(Indorsement on cover): No. 895. The United States, appellant, vs. David W. Minor. California C. C. U. S. Filed August 4th, 1884.

114-233

FILED
JAN 21 1885
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1884.

BAR ASSOCIATION

THE UNITED STATES
vs.
MINOR.
No. 895.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
vs.
MINOR.
} No. 895.

BRIEF FOR THE UNITED STATES.

This case is one in which the United States have filed a bill to vacate a patent for land lying in California, upon the ground of fraud upon the land office committed by the defendant, the patentee. A demurrer was put in, and upon argument there was a division of opinion, and thereafter a dismissal of the bill in accordance with the views of the presiding judge; an appeal, and a certificate of division.

The land in question is the northwest quarter of section 18, township 6 N., range 2 E., Humboldt meridian, &c.

The amended bill states that in April, 1872, one Spence entered upon a lot including the western half of the above quarter, in order duly thereafter to pre-empt it when surveyed, &c.; that, in October, 1874, an approved plat thereof was filed, and the same became subject to pre-emption, and that in December, 1874, said Spence, being a

citizen, head of a family, &c., filed in the land office a pre-emption declaratory statement for such lot, and thereupon built a house and cleared lands thereupon and fully complied with all requirements of the law, &c. That in January, 1878, Spence, with the consent of the land office, transmuted his said pre-emption right into a homestead entry, and thereafter and still holds said lands as a homestead claim; and in April, 1878, made affidavit of final homestead proof, &c., and paid the proper fees, and has been and is, the equitable owner of said land as against the United States.

Also, that in October, 1874, Minor, the defendant, made in the land office a pre-emption declaratory statement for *the whole* of that northwest quarter (the west *half* of which Spence had dealt for as above), alleging settlement thereon in March, 1874; that in June, 1875, before the register of said land office, Minor made the usual affidavit of pre-emption proof, stating a settlement thereupon in March, 1874, improving and cultivation thereof by him, and the building of a house and continued residence thereon with his family from the time of settlement until that time; that thereupon he paid to the receiver the price in full and received therefor a certificate of purchase, and in January, 1876, a patent; that the oath and proof of such settlement and improvements by Minor were false and fraudulent; that there was no settlement by him then or at any time upon the land in question, nor any cultivation or residence of or upon any portion thereof; that the register and the receiver and other land officers of the United States were misled by such statements of Minor, &c., and in all their above dealings with him acted

in ignorance of the rights of Spence, although his affidavit was upon file.

The prayer is that the patent be recalled and canceled, &c.

Upon demurrer (1, *generally*, and, 2, *because of delay*), the following questions arose and are certified:

1. Whether the frauds and perjury alleged are extrinsic and collateral to the proceedings in the land office, so as to justify the relief asked.

2. Whether the perjury alleged is such fraud as will require a court of equity to vacate the patent.

3. Whether the alleged issue of a patent, &c., is not conclusive upon the United States in a case like the present.

4. Whether the United States in such a case should not offer to return the purchase-money.

5 Whether a court of equity will enforce the penalties and forfeitures of section 2262 Revised Statutes.

6. Whether proceedings at law under section 2262 and an indictment for perjury, are not the only remedies for the wrongs alleged in the amended bill.

7. Whether the delay of seven years and five months in filing the bill be not a bar.

8. Whether the demurrer should not be sustained.

[Certain statutory provisions upon the matter of issuing patents for land are to be found in the appendix.]

The general theory upon which the argument on behalf of the United States in this case will proceed is, that an

applicant to purchase lands from them is bound to the ordinary good faith which is due in any case of purchase:

That the United States are obliged to act through agents subjects them to no legal rule imposing disadvantages not common to natural persons when acting through agents:

That the circumstance that the affairs of the United States in connection with the public lands are so vast as to necessitate a complicated series of executive offices in order to effect sales, is not one which creates a difference in the above respect betwixt them and private persons transacting these same affairs more simply:

That just as in case the United States resort for remedy to the ordinary courts of justice they must with slight exception do so under the conditions which bind ordinary litigants; so where they transact business out of court they do it with all the securities, both prior and subsequent, for good faith to which private persons can make claim.

For instance, and to come nearer to the features of this case, *if, in accordance with solid public policy, the United States grant pre-emptions upon certain preliminary conditions, which are of the substance, it is plain fraud to obtain a pre-emption by false representations of the existence of such conditions made in a way calculated to impose upon ordinary intelligence. And if a statute, acting upon ordinary presumptions and in view of the general convenience, require the public agent who is charged with granting such pre-emptions to accept of an affidavit or other stated evidence as proof of the existence of such conditions, such statutory rule is conclusive as to what it is that ordinary intelligence may, in such cases, safely rely upon, and a perversion of such rule by perjury, &c., brings*

any case so affected within short range of that protection which equity gives ordinarily to intelligence and vigilance when overreached. Nor, as I repeat, can the circumstance that the imperial, and at the same time free, character of our Government necessitates a complicated executive machinery to represent the United States in such matters—for, amongst other things, the convenience of purchasers and the accountability of public agents—differ such a case from that in which a private seller of lands when acting with due vigilance has been laid wait for and defrauded. These *shields* of the Government and honest citizens cannot be turned into *swords* by which dishonest men may carve fortunes out of the public domain or elsewhere.

The United States are as much entitled as one of their own citizens to the constitutional *day in court* about such matters. In the act of disposing of their public lands, they are not *litigants*, or chargeable with that raised state of attention and activity that is required of litigants. Nor, to look at the same matter from a different point of view, are they then and there soliciting for themselves an intervention of that particular quality of protection by society which is to be had in general only from the Judiciary Department of the Government; or otherwise from tribunals formally invested with the power finally to decide some question antecedently existing. Fraud upon a vendor committed in a transaction *in pais* is one thing. and, upon the *maxim ut finis sit litium*, fraud committed upon the same person whilst litigating questions which arose during that transaction is entirely another. Proceedings to procure patents for land by pre-emption and homestead entry are neither formally nor in effect *lites*.

To consider the questions certified by the learned court below, in their order—

1 (*a.*) The proceedings in the land office referred to, being neither judicial nor quasi judicial, in the sense necessary for such doctrine, give no occasion for a discussion of the definition of *extrinsic and collateral* fraud. However,

(*b.*) If they be so far judicial, the fraud in question is, in its essence, extrinsic and collateral.

This case is one in which the patent was issued upon an ordinary *ex parte* pre-emption application, without controversy.

If the grantor had been a private person he could not, of course, of his own volition recall or annul it. If there had been fraud *in the factum* he could in ejectment or other suitable action at law treat it as a nullity; but if the fraud were fraud only in the negotiation or consideration, for relief he would have to resort to equity. (Canoy *vs.* Troutman, 7 Iredell, 157, &c.) For any adequate fraud in a negotiation never theretofore a subject of litigation the grantor can have relief in equity. But if this latter sort of fraud have really been presented or involved in prior litigation betwixt the parties, the matter is finally *concluded*, unless, indeed, such prior litigation were itself tainted by *fraud upon public justice*, which is, of course a fraud *collateral* or *extrinsic* as regards the original transaction.

I understand the numerous cases upon this matter in this court, beginning with that of Johnson *vs.* Towsley (13 Wall. 72) to be no more than a large and wise development

of the above principles of elementary law applicable to private citizens. No cases of fraud in the factum have been presented in connexion with land patents. The machinery in the land office may render such fraud almost impracticable, but if a case thereof were to occur, nothing has fallen from the court, so far as I know, to exclude the old remedy.

In the case of fraud in the consideration not previously a subject of litigation almost every opinion in these land cases states that it is remediable in equity.

Those cases in which it is said that to justify relief in equity the alleged fraud must be *extrinsic* or *collateral* are cases in which there has been an opportunity during some previous litigation betwixt the parties before an executive or judicial tribunal to raise the question of fraud in the consideration, which opportunity being omitted carries with it, upon general principles (fraud upon such tribunal aside), a conclusive presumption to the contrary.

In Throckmorton's case (98 U. S., 61) the United States themselves were not allowed to show an alleged notorious fraud in the negotiation, because they had previously been parties to litigation begun before a commission and afterwards carried into their own district court, in which the existence of such fraud was, or might have been, made a ground of defense. That is, the United States had previously been called before a legitimate tribunal upon an allegation (by those under whom Throckmorton claimed) of an already existing legal or equitable right to the land in question, an allegation in respect of which proof of the supposed fraud would have been pertinent and material,

whilst no such proof had been made. The principle of that decision is one, therefore, not only just, but venerable

In Vance *v.* Burbank, 101 U. S., 514, a private person sought in equity to review a decision in the land office of a matter about which there had been in that office a controversy to which both litigants were privy. The fraud complained of was material to that controversy, and might have been shown therein. No fraud upon the previous litigation itself being pretended, it was held that further controversy was inadmissible.

Throckmorton's case has been subsequently cited by this court upon the following pages of its reports, but I do not find such citations important here: 101,[479]; 106,[454]; 107,[528]; 108,[512], and 111,[520].

In this connection I submit that in cases like Vance *v.* Burbank the perjury, &c., alleged as ground for relief is necessarily regarded and treated only in its character as a wrong *to the other litigant*, who has of course no right for any private purposes to bring into question there the wrong which such perjury may have done *to the public*. Like questions as to illegal conduct by corporations warranting forfeiture of charter, this is a matter exclusively for the public.

Therefore, in addition to what has already been urged, viz, *that ordinary ex parte proceedings to obtain patents for land are not of the nature of litigation*, it is now as a distinct contention submitted that if they could be so regarded, then the counter-litigant must be *the public*, represented therein by its officers, who, in accepting that form of proof which a statute prescribes, are acting with ordinary official diligence, so that if such *proof* be perjured,

these and their principals are thrown off their guard and, *as a tribunal*, are practiced upon by a fraud which nullifies their conclusions.

But the other contention seems preferable, viz, that inasmuch as the private citizen who is called to transact the business of selling land is not thereby *required* to be so vigilant that allegations of being practiced upon cannot thereafter be made to a court, so it is also with those details of care required of the United States in the person of their officers in *consimili casu*. In other words, they also shall have "a day in court" thereabout, if they choose.

II. I submit that a court of equity will regard the express conditions upon which the statute allows of pre-emption as dictated by wise policy, and therefore as of the very substance of the transaction, so that perjury as to the existence of these conditions is fatal.

III. This question has in effect already been discussed.

IV. The theory of the bill involves the incident under section 2262, Rev. Stat., that the price is not to be returned. Therefore whether the "forfeiture" in that section must for its "perception" be made out *at law*, or whether that word is to be read as nothing more than a statutory declaration of what is otherwise true, viz, that the privilege of pre-emption cannot be availed of unless by a *bona-fide* performance of the statutory conditions precedent, coupled with a provision that the price shall not be restored in a case of a pre-emption obtained by fraud; in either case I submit that the ordinary rule as to the tender of price is not required in order to confer jurisdic-

tion in equity. If in a case which in its view otherwise pointed to a probability that by legal proceedings of some sort the price was to remain in the Treasury, a court of equity were to require its tender, that would be to do an act *frustra*.

The ordinary equitable rule is not applicable in any case so set forth in a bill.

Besides, if this be not true, it may be doubted whether the sovereign under such circumstances need *profess* what is universally attributable to it, *i. e.*, willingness to do equity; its ability so to do being also unquestionable.

VI. The new statutory remedy, in the absence of words expressly or by strong implication excluding remedies otherwise already existing, does not, upon well-settled principles, affect the previous jurisdiction in equity. No ground of such implication has been suggested or occurs to me. Express words to that effect are entirely wanting. But, as already suggested, such previous remedy will take some color from the statute.

VII. The original malefactor being still the only person concerned in the results of the transaction, it seems that a lapse of seven and a half years gives no occasion for quieting his ill-gotten title.

VIII. Nothing is said upon this question in the brief of the learned counsel upon the other side, and nothing more occurs to me, in that connection, than has been already submitted.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

PRE-EMPTIONS.

(Revised Statutes.)

SEC. 2257. All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions, and stipulations provided by law.

SEC. 2259. Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land.

SEC. 2262. Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section twenty-two hundred and fifty-nine; that he is not the owner of three

hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land-office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law.

SEC. 2263. Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.

SEC. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon

and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

SEC. 2265. Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

SEC. 2266. In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.

SEC. 2273. When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.

HOMESTEADS.

SEC. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a pre emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SEC. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.

114-238

SUPREME COURT OF THE UNITED STATES.

No. .....

THE UNITED STATES, *Complainant,*

vs.

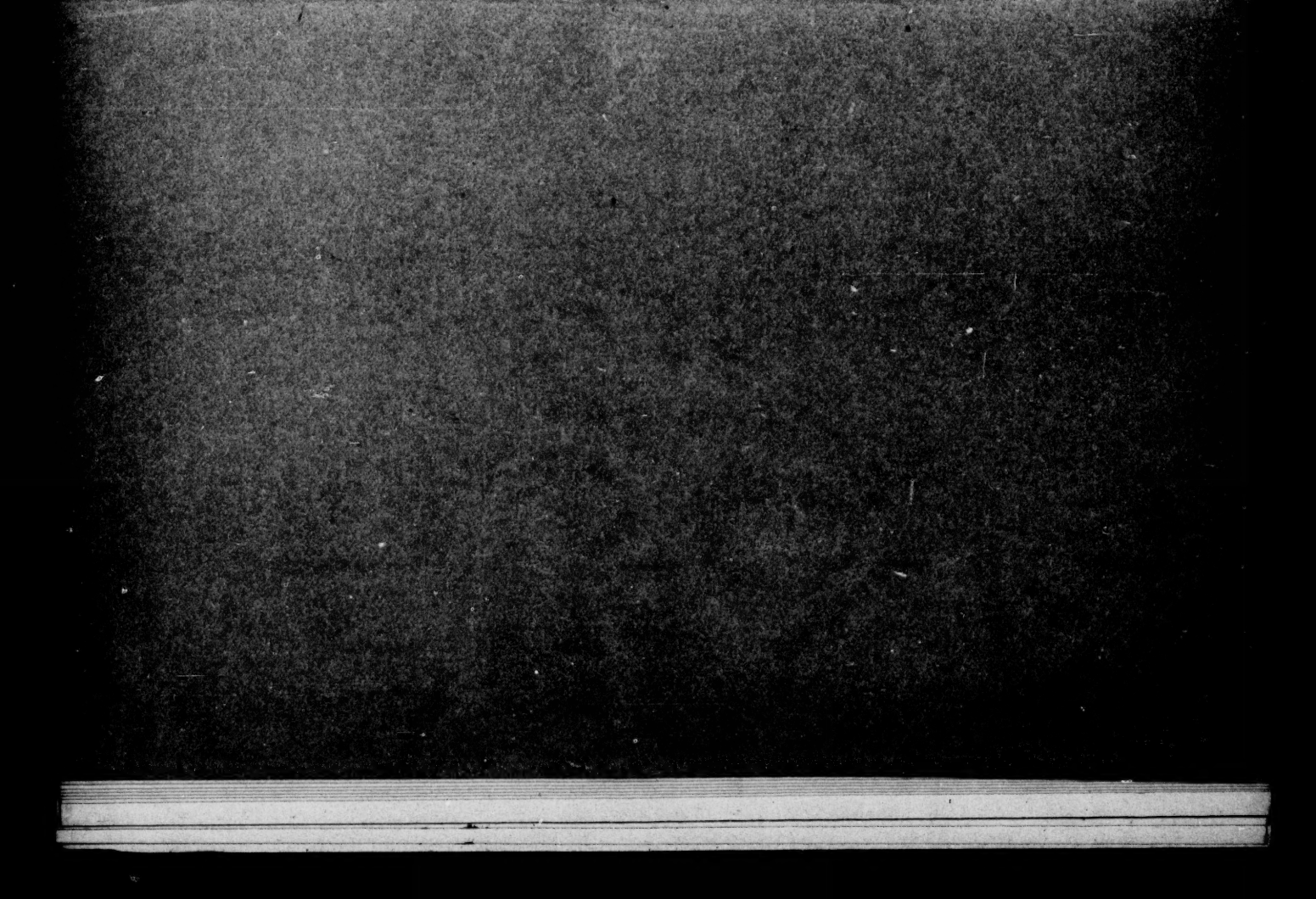
DAVID W. MINOR,

Defendant.

On Certificate of Division of Opinion.

BRIEF IN BEHALF OF THE DEFENDANT.

L. D. LATIMER,
Counsel for Defendant.



IN THE SUPREME COURT

OF THE

UNITED STATES.

THE UNITED STATES,

Complainant,

vs.

DAVID W. MINOR,

Defendant.

Brief in Behalf of the Defendant.

This case is here on certificate of division of opinion of the Judges of the Circuit Court below, upon the points set forth in the record.

The prevailing opinion of the Circuit Judge, Sawyer, is so complete in itself, and so fully covers the whole ground, that it seems no room is left for argument or suggestion; especially so when considered in connection with his opinion in *U. S.* vs. *White*, which is also annexed to the

record, and which may also be found in 17 Federal Reporter, p. 561, and 9 Sawyer, 125.

I shall confine myself, therefore, to the mere suggestion of a few points and authorities, merely hoping thereby to facilitate the investigations of the Court.

The first three questions upon which the opinions of the Judges were opposed, are as follows :

I

Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating the patent in question are frauds extrinsic and collateral to the matter tried and determined in the Land Office, upon which the patent issued, and constitute such frauds as entitle the complainant to relief in a Court of Equity ?

II.

Whether the perjury and false testimony in a proceeding before the Land Office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud, as will require a Court of Equity to vacate the patent on that ground alone ?

III.

Whether the decision and determination of the questions involved on false and perjured

testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States, on a bill filed to vacate the patent so issued ?

It seems that these three questions may properly be considered together, and as to them it is respectfully submitted:—

First:—The decision of the officers of the land department upon the facts whether the preemptioner, Minor, had settled upon and inhabited and improved the land, was a judicial decision upon the testimony before them, and is conclusive and final as between the United States and him.

In *Warren* vs. *Van Brunt*, 19 Wallace, 652, the Court said :

" The issuance of the patent on the award of " these officers was final and conclusive as be- " tween the United States and the several claim- " ants, but," (quoting from *Johnson* vs. *Towsley*, 13 Wall, 72) " it was the right of the proper " courts to inquire *after the title had passed from* " *the government, and the question became one of* " *private right*, whether * * * the party " holding that title should hold absolutely as his " own, or as trustee for another."

In *Shepley* vs. *Cowan*, 91 U. S., 340, it is said:

" If they " (such officers) " err in the construc- " tion of the law * * or if fraud is practiced " upon them, * * their rulings may be exam-

"ined * * *when a controversy arises between "private parties founded upon their decisions."*

See, also:

Marquez vs. *Frisbie*, 101 U. S., 476.
Moore vs. *Robbins*, 96 U. S., 533.
Quimby vs. *Conlan*, 104 U. S., 425.
Aiken vs. *Ferry*, 6 Sawyer, 79.
Vance vs. *Burbank*, 101 U. S., 519.

And again:

The particular acts of fraud charged in the bill are not such as will authorize a Court of Equity to set aside or disturb the judgment and decision of the land officers in holding that the defendant pre-emptor had proven himself to be entitled to the land, and awarding and issuing to him a patent therefor.

In *Smelting Co.* vs. *Kemp*, 104 U. S., 640, it is said:

"In the course of their duty the officers of that "department are constantly called upon to hear "testimony * * and to pass upon its compe- "tency, credibility and weight. In that respect "they exercise a judicial function. * * Their "judgment in such cases is like that of other "special tribunals," etc., etc.

And the fraud for which the judgments of judi-

cial tribunals are impeachable in Courts of Equity, are collateral acts, extrinsic to the merits.

U. S. vs. *Throckmorton*, 4 Sawyer, 42.
U. S. vs. *Throckmorton*, 98 U. S., 61–66.
Vance vs. *Burbank*, 101 U. S., 519.

There have been cases where the United States has maintained actions to set aside patents which had been issued for lands reserved from or not subject to entry and sale under the laws.

In such cases it is clear that the Land Officers had no jurisdiction, and upon that ground such actions have been sustained, and that only.

The fourth question upon which the opinion of the Judges were opposed, is as follows :

IV.

Where the United States files a bill to vacate a patent, on the ground that it was fraudulently obtained upon false testimony, as alleged in said amended bill, whether it is necessary to offer in the bill to return the purchase money paid for the land by the patentee ?

This matter seems too plain for argument. That no one can have rescission without placing the other party *in statu quo* is elementary law.

The fifth and sixth questions certified are as follows :

V.

Whether a Court of Equity will enforce the penalties and forfeitures imposed by Section 2262 of the Revised Statutes of the United States for obtaining a patent to land upon false affidavits?

VI.

Whether the remedy at law provided by said sections and an indictment for perjury are not the only remedies for the wrong alleged in the amended bill?

Courts of Equity have no jurisdiction of matters of forfeiture, unless specially conferred by statute, (*Stevens* vs. *Cady*, 2 Curtis, 200), and Section 2262 of the Revised Statutes does not confer it.

It seems clear that an action to recover the penalties and forfeitures prescribed by that section must be at law and not in equity.

The seventh question is as follows:

VII.

The bill of complaint having been originally filed in this case on June 19th, 1883, more than seven years and five months after the issue of the patent, whether the claim to vacate the patent on the ground of fraud is stale, and

whether the bill ought to be dismissed on that ground?

That the bill comes too late, and that the claim is stale, the Court is respectfully referred to the following cases, to-wit:

Kerr on Fraud, 367 note.
2 Daniel's Ch. P., 1585.
99 Mass., 213.
7 Allen, 438.
Badger vs. *Badger*, 2 Wall., 94.
Stearns vs. *Page*, 7 How., 819.
1 Story's Eq. Jur., Sec. 64a.
2 Story's Eq. Jur., Section 1521a.

And, laches is imputable to the United States the same as to any other complainant who seeks the aid of a Court of Equity.

U. S. vs. *Throckmorton*, 4 Sawyer, 42.

With reference to the third question, it may be further said that it nowhere appears by the bill that the complainant—the United States—has in any way been injured or damaged. On the contrary, it is manifest that it has not been.

Such allegation is necessary to support the bill, and should show that by reason of the facts stated the complainant had sustained *loss* or *damage*, and how and to what extent. The rule is stated in 1 Story's Equity Jurisprudence, Sec. 203: And, "When the United States enters

the Court as a litigant, * * * it stands upon the same footing with private individuals."

U. S. vs. *Throckmorton*, 4 Sawyer, 42.
U. S. vs. *Tichenor*, 12 Federal Rep., 415.

In conclusion, I think it not inappropriate to quote the language used by the Circuit Judge in his decision in the case of *Cowell* vs. *Lammers*, (21 Fed. Rep., p. 208), to wit:

"Circumstances from the beginning, in this "State, seem to have conspired to afford an infi- "nite variety of pretexts, more or less plausible, "for assailing all classes of patents to land issued "by the United States, and on that ground to "create a very general and widespread feeling of "insecurity and distrust in regard to land titles. "The sooner it comes to be a generally recog- "hized principle, that a United States patent, reg- "ular upon its face and upon the record, issued in "the forms prescribed by the laws, means some- "thing,—that it is unassailable collaterally, or even "with success directly, by parties having the prop- "er *status*, except upon clear and indisputable "grounds and evidence,—the sooner confidence in "land titles will be re-established, and the better "it will be for the good order, tranquillity, pros- "perity and happiness of the people of Califor- "nia."

Respectfully submitted,

L. D. LATIMER,

Counsel for Defendant.